

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LIONELL ERNEST THOLMER,
Petitioner,
vs.
JAMES GOMEZ, et al.,
Respondents.

Case No. 2:95-cv-01901 JKS GGH

ORDER

Petitioner, a state prisoner proceeding pro se, has timely filed a Notice of Appeal from the judgment entered herein on December 19, 2007. Docket No. 160.

Before Petitioner can appeal the judgment, a Certificate of Appealability (“COA”) must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). When a petition has been denied “on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue . . . if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

In this case, no reasonable jurist could find that Petitioner’s filing did not constitute a successive petition under 28 U.S.C. § 2244. Petitioner’s first petition for a writ of habeas corpus concerning his conviction for the Meadow’s murder was denied on the merits in 1991. Petitioner filed a second petition concerning his conviction for the Meadow’s murder that was denied as an abuse of the writ in 2002. Petitioner’s latest filing, though it attempts to circumvent the limitations on successive petitions by invoking Rule 60(b), constitutes a successive petition because it again

seeks to attack the underlying state court conviction. *See Gonzalez v. Crosby*, 545 U.S. 524, 532-33 (2005). As such, Petitioner must seek authorization from the Ninth Circuit Court of Appeals to proceed on his petition. 28 U.S.C. § 2244(b)(3).

For these reasons, the Court declines to issue a Certificate of Appealability; any further request for a Certificate of Appealability must be addressed to the Court of Appeals. *See Fed. R. App. P. 22(b); Ninth Circuit R. 22-1.*

IT IS SO ORDERED.

Dated this the 1st day of February 2008.

/s/ James K. Singleton, Jr.

JAMES K. SINGLETON, JR.
United States District Judge

ORDER